



1 Jason F. Carr  
2 Chief Appellate Attorney  
3 Federal Defenders of Eastern Washington and Idaho  
4 10 North Post Street, Suite 700  
5 Spokane, Washington 99201  
6 509.624.7606  
7 Counsel for Flaherty

8  
9 United States District Court  
10 Eastern District of Washington  
11

12 UNITED STATES OF AMERICA,

13 Plaintiff,

v.

14 DANIEL ALLEN FLAHERTY,

15 Defendant.

16 Case No. 2:08-cr-0137-WFN-29  
17

18 Motion to Modify Sentence  
19

With Oral Argument  
January 15, 2021.

14 MOTION TO MODIFY SENTENCE DUE TO THE EXTRAORDINARY  
15 AND COMPELLING CIRCUMSTANCES PURSUANT TO 18 U.S.C.  
16 § 3582(c)(1)(A)  
17  
18  
19

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## INTRODUCTION

Movant and federal prisoner Daniel Allen Flaherty hereby files this motion to modify his 262-month sentence under 18 U.S.C. § 3582(c)(1)(A).<sup>1</sup> (*See* Electronic Court Filing No. (ECF) 205.)<sup>2</sup> The underlying legal basis is the fact that he has stage-three kidney disease. (*See, e.g.*, Exhibit (Ex) F, at 15, 25, 27 (sealed medical records).) This is an incurable condition but those inflicted can slow further progression given the proper conditions and environment.<sup>3</sup> His prognosis is grim, however, as two of his aunts have needed transplants. If that fate befalls Mr. Flaherty, he is in significant danger.

<sup>1</sup> Because this filing is relatively replete with footnotes, Mr. Flaherty respectfully requests this Court waive the requirement that footnotes be double-spaced as otherwise required under LCivR 10(d).

<sup>2</sup> Flaherty's sentence stems from this Court's October 15, 2009 written judgment based on his plea of guilty to one count of Conspiracy to Distribute 500 Grams or More of a Mixture Containing a Detectable Amount of Methamphetamine, a violation of 21 U.S.C. § 846). (*See* Electronic Court Filing No. (ECF) 1671.) The Court originally imposed a sentence of 276-months, but modified that downward based on Flaherty's motion for a sentencing reduction based on a retroactive Sentencing Guideline change. (See ECF 2827.)

That judgment imposes a sentence of 192 months along with a five-year term of supervised release. (*See id.*)

<sup>3</sup> *See* Healthline, *Everything you Should Know about Stage 3 Kidney Disease* (Dec. 8, 2020), <https://www.healthline.com/health/stage-3-kidney-disease>.

Mr. Flaherty asserts that prison conditions are not conducive to arresting the condition's progress.

1           Barring a matching donor, the wait for a kidney donation averages  
2 five years.<sup>4</sup>

3           To the best of his knowledge, Mr. Flaherty cannot get on a donor  
4 list while in custody.

5           Overlaying this condition is the threat of a COVID-19 infection.

6           This Motion provides the legal framework underlying Flaherty's  
7 request and further maintains that "extraordinary and compelling"  
8 circumstances warrant a sentencing modification. It stresses the  
9 following points.

10          First, Mr. Flaherty has adequately pursued prison remedies and  
11 hence has met administration exhaustion requirements.<sup>5</sup> *See* 18 U.S.C.  
12 § 3582(c)(1)(A) (2020 rev. ed.) (detailing the requirements).<sup>6</sup> Mr. Flaherty  
13

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14          <sup>4</sup> *See* American Kidney Fund, Transplant Waiting List (Dec. 8, 2020),  
15 https://bit.ly/2JFJVR8

16          <sup>5</sup> (*See* Exhibit (Ex.) B.)

17          <sup>6</sup> Which reads, in pertinent part:

18               (c) Modification of an imposed term of imprisonment.--The court  
19 may not modify a term of imprisonment once it has been imposed  
except that--

18                       (1) in any case--

19                               (A) the court, upon motion of the Director of the Bureau of Prisons,  
or upon motion of the defendant after the defendant has fully

even appealed the initial denial.<sup>7</sup> When that failed, he tried again.<sup>8</sup> Mr. Flaherty's motion is properly before this Court. *See United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020); *see also United States v. Haney*, 454 F. Supp.3d 316, 321 (S.D.N.Y. 2020) (to satisfy §3582(c)'s exhaustion requirement, a defendant must either exhaust administrative remedies with the BOP or "simply wait 30 days after serving his petition on the warden of his facility before filing a motion in court.").

Second, recent case law establishes that universe of what this Court may consider "extraordinary and compelling" is not cabined by the criteria listed in U.S. Sentencing Guideline § 1B1.13.<sup>9</sup> *See, e.g., United*

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exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

<sup>7</sup> (*See Ex. B, at 10.*)

<sup>8</sup> In correspondence, Mr. Flaherty informed counsel on November 7, 2020, that he reapplied for compassionate release. Mr. Flaherty characterized this as "the third time," but he may have also been referring to his appeal of the warden's first denial.

<sup>9</sup> The relevant portion of § 3582(c)(1)(A) states that the court, upon motion of the defendant, may reduce a term of imprisonment:

1     *States v. Gunn*, No. 20-1959, 2020 WL 6813995 (7th Cir. Nov. 20, 2020);  
2     *United States v. Jones*, No. 20-3701, 2020 WL 6817488 (6th Cir. Nov. 20,  
3     2020); *United States v. McCoy*, No. 30-6821, 2020 WL 7050097 (Dec. 2,  
4     2020). This is an understatement as it is not the case that § 1B1.13 has  
5     limited applicability. The section does not apply at all. *See United States*  
6     *v. Jones*, No. 20-3701, 2020 WL 6817488, at \*7-9 (6th Cir. Nov. 20, 2020);  
7     *accord United States v. Brooker*, 976 F.3d 228, 235-36 (2d Cir. 2020)  
8     (explaining that § 1B1.13 survives, but only apply “to those motions the  
9     BOP has made”).

10  
11  
12  
13               after considering the factors set forth in section 3553(a) to the  
14               extent that they are applicable, if it finds that--  
15               (i) extraordinary and compelling reasons warrant such a reduction;  
16               or  
17               (ii) the defendant is at least 70 years of age, has served at least 30  
18               years in prison, pursuant to a sentence imposed under section  
19               3559(c), for the offense or offenses for which the defendant is  
              currently imprisoned, and a determination has been made by the  
              Director of the Bureau of Prisons that the defendant is not a  
              danger to the safety of any other person or the community, as  
              provided under section 3142(g);

18               \* \* \*

19               and that such a reduction is consistent with applicable policy  
              statements issued by the Sentencing Commission;

1       Third, Mr. Flaherty's circumstances warrant a sentencing  
2 modification. The federal Bureau of Prisons (BOP) houses Mr. Flaherty  
3 at USP Lompoc a former "COVID hotspot."<sup>10</sup> Conservatively, more than  
4 seventy percent of the inmates, and at least sixteen staff members, have  
5 contracted the disease when considering the entire prison complex, i.e.,  
6 the minimum-security camps, the low security FCI, and the high security  
7 prison. *See* Federal Bureau of Prisons, COVID-19 Coronavirus, COVID-  
8 19 Cases, <https://www.bop.gov/coronavirus/> ("Full breakdown and  
9 additional details" search). Four inmates at the complex have died from  
10 COVID-19.

11       This is a dire situation for Mr. Flaherty as kidney disease is a  
12 recognized COVID-19 high-risk factor.<sup>11</sup> Moreover, because the epidemic  
13 has overwhelmed Lompoc's medical staff, Mr. Flaherty is not receiving  
14 adequate medical care for this kidney disease. This will lead to a  
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16 <sup>10</sup> BOP houses Mr. Flaherty in the adjacent minimum security North Camp.

17 <sup>11</sup> Centers for Diseases Control (CDC), *People with Certain Medical Conditions*  
18 (Dec. 9, 2020), <https://bit.ly/3lQrx5V>. "Adults of any age  
with **certain underlying medical conditions** are at increased risk for severe  
illness from the virus that causes COVID-19. *Id.* (emphasis in original).  
"Severe illness from COVID-19 is defined as hospitalization, admission to the  
ICU, intubation or mechanical ventilation, or death." *Id.*

1 continuing loss of function as the malady progresses to stage IV. Already  
2 Mr. Flaherty has difficulty functioning as he is in constant pain, secrets  
3 blood in his urine (hematuria), has elevated levels of creatinine, and  
4 abnormal blood panels.<sup>12</sup> Any further deterioration and Mr. Flaherty will  
5 be unable to handle the prison environment.<sup>13</sup>

6 Finally, as mentioned, “the First Step Act freed district courts to  
7 consider the full slate of extraordinary and compelling reasons that an  
8 imprisoned person might bring before them in motions for compassionate  
9 release.” *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). Mr.  
10 Flaherty, who has been in custody for approximately twelve years, has  
11 made significant strides in rehabilitating himself.<sup>14</sup> (*See, e.g.*, Exhibit A,  
12

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13 <sup>12</sup> (*See* Ex. F, at 1, 11-14, 25, 33-34, 36.)

14 <sup>13</sup> Chronic kidney disease has five stages: 1) at stage I, an individual's kidneys  
15 function at 90 percent or higher; 2) at stage II, an individual's kidneys function  
16 at 60–89 percent, which does not require radical treatment; 3) at stage III, an  
17 individual experiences “moderately reduced kidney function” and their kidneys  
18 operate at about 30–59 percent; 4) stage IV is marked by “severely reduced  
kidney function” and an individual “may be feeling quite ill at this stage,” as  
their kidneys only function at about 15–29 percent; and 5) at stage V, an  
individual's kidneys function at less than 15 percent and they are either  
waiting for a kidney transplant or are on dialysis. (citing *United States v.*  
*Davidson*, 2020 WL 487725, \*2 n.2 (Aug. 20, 2020) (citing National Kidney  
Foundation, *What are the Stages of Chronic Kidney Disease?* (August 6, 2020),

19 <sup>14</sup> The criminal docket indicates that the magistrate court arraigned Mr.  
Flaherty on October 1, 2008, and ordered him detained pending trial on

1 at 7-9 (glowing article from the National Association of Institutional  
2 Agribusiness on Mr. Flaherty's job training and progress).)<sup>15</sup>

3           Mr. Flaherty has served a significant portion of his 264-month  
4 sentence.<sup>16</sup> BOP projects an April 2, 2027 release date.<sup>17</sup> He is also a  
5 good risk for release to home confinement as he possesses strong family  
6 support and the means to support himself.<sup>18</sup>

7           While Flaherty's criminal record reveals drug addiction and  
8 distribution activities, he has no convictions for violent activities.<sup>19</sup> Drug

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10 October 3, 2008. (See Electronic Court Filing Nos. (ECF) 215, 287.)

11           <sup>15</sup> *But see* 28 U.S.C. § 994(t) (2018) (directing that rehabilitation cannot be the  
12 only factor that warrants release). However, as explained in *McCoy*, “there is  
13 no indication that successful rehabilitation efforts may not be considered as  
14 one among other factors under § 3582(c)(1)(A)(i), and the government does not  
15 argue otherwise here.” 2020 WL 7050097, at \*11 n.9.

16           <sup>16</sup> As of December 2020, Mr. Flaherty has served approximately 145 months in  
17 custody with 76 remaining, with good time credits. This is 65.61% of his  
18 sentence. Note that, as detailed in BOP paperwork, Mr. Flaherty has earned  
19 Second Chance Act credits which would allow BOP to place him in a half-way  
house 17-19 months prior to his projected release date. (*See* Ex. A, at 6  
(Program Review comments).)

16           <sup>17</sup> *See* Federal Bureau of Prisons, *Find an Inmate*,  
<https://www.bop.gov/inmateloc/> (last accessed November 20, 2020).

17           <sup>18</sup> (*See* Ex. A, at 1-2; *see also* Ex. B, at 11 (detailing Mr. Flaherty's release plan,  
sentence completion, and medical status as of August 2020).)

18           <sup>19</sup> (*See* Presentence Investigation Report (PSR) ¶¶ 104-84 (criminal convictions  
and Criminal History calculation).)

1 distribution, while admittedly serious, is a non-violent offense.  
2 Moreover, there is a viewpoint, becoming ever more prevalent, that the  
3 harsh sentences imposed for non-violent drug offenses were misguided  
4 and ultimately counterproductive.<sup>20</sup>

5 That said, Mr. Flaherty recognizes he broke federal law and  
6 deserves a severe consequence. He did not plead guilty, however, to a  
7 capital offense. Mr. Flaherty wants to pay his debt to society, just in a  
8 manner that is safe and will allow him to treat his chronic kidney disease  
9 condition. With the proper care, there is a possibility he will not need a  
10 transplant. If he contracts COVID-19, however, he faces enhanced risk  
11 of death or life-altering complications. His serious medical condition, the  
12 added risk should he contract COVID-19, and BOP's inability to provide  
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<sup>20</sup> See, e.g., Alyssa Stryker, Drug Policy Alliance, *Rethinking the "Drug Dealer,"* (Dec. 17, 2019), <https://drugpolicy.org/drugsellers>. Among the findings for the report are that Congress created current drug laws on the premise that they would reduce overall supply, and in turn, consumption. In reality, the opposite has occurred. Meanwhile, we have increased the amount of people incarcerated for selling or distribution offenses by 3000%—from 15,000 in 1980 to 450,000 today—but drugs are more readily available, at significantly lower prices. See *id.* (Key Facts section); accord Sean Ross, Investopia, *The Economics of Illicit Drug Trafficking* (Nov. 14, 2019), <https://bit.ly/341sgtM> (“Basic economic analysis can show why most prohibitions fail to realize their intended goals and why making drugs illegal may actually benefit drug producers and suppliers at the expense of everyone else.”).

1 him proper treatment, singularly and cumulatively, constitute a  
2 significant, “extraordinary and compelling” factor warranting a sentence  
3 modification. *Cf.* 18 U.S.C. § 3282(c)(1)(A) (2020 rev. ed.).

4 For these reasons, Movant Daniel Allen Flaherty humbly and  
5 respectfully requests this Court release him from custody, extend his  
6 term of supervised release, and place him on home confinement for the  
7 remaining portion of his custodial sentence.

8 **STATEMENT OF THE CASE**

9 A federal grand jury indicted Daniel Allen Flaherty on September  
10 11, 2008, for conspiracy to distribute 500 grams or more of  
11 methamphetamine.<sup>21</sup> The magistrate court ordered him detained  
12 pending trial on October 3, 2008.<sup>22</sup>

13 On May 11, 2009, Mr. Flaherty pleaded to Count 1 of the Second  
14 Superseding Indictment alleging a conspiracy to distribute in violation of  
15 21 U.S.C. § 846.<sup>23</sup> The Defendant pleaded guilty pursuant to Federal  
16

17 <sup>21</sup> (*See* ECF 1; *see also* ECF 349 (Superseding Indictment); ECF 614 (Second  
18 Superseding Indictment).)

<sup>22</sup> (*See* ECF 278, 287.)

<sup>23</sup> (*See* ECF 1243, 1244.)

1 Rule of Criminal Procedure, Rule 11(c)(1)(C) agreement, stipulating that  
2 the conspiracy distributed more than 15 kilograms of methamphetamine  
3 and that this amount was reasonably foreseeable to Mr. Flaherty.<sup>24</sup> Mr.  
4 Flaherty also agreed that the government properly filed its 21 U.S.C.  
5 § 851 thereby increasing his mandatory minimum to twenty years. The  
6 United States, in turn, agreed not to file a second § 851 enhancement  
7 which would have subjected Mr. Flaherty to a mandatory life sentence.  
8 Mr. Flaherty further agreed he was a career offender, stipulating his  
9 applicable offense level was a 35 with an advisory guideline range of 292-  
10 365 months.<sup>25</sup> The agreement, however, stipulated to a sentencing range  
11 of 264-300 months and further agreed to run a pending supervised  
12 release sentence concurrent to that sentence.<sup>26</sup>

13       Mr. Flaherty agreed to a substantial forfeiture of assets and  
14 \$23,246.61. He also waived his right to appeal.<sup>27</sup>  
15

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<sup>24</sup> (*See* ECF 1246 (written plea agreement).)

17       <sup>25</sup> (*See id.* at 14, 17.)

18       <sup>26</sup> (*See id.* at 15, 17.)

19       <sup>27</sup> (*See id.* at 19-21.)

1       On October 14, 2009, this Court followed the written plea  
2 agreement by sentencing Mr. Flaherty to 276 months of incarceration.<sup>28</sup>  
3 He did not file an appeal.

4       Mr. Flaherty sought 2255 relief. This Court denied that application  
5 on May 24, 2012.<sup>29</sup> The United States Court of Appeals affirmed.<sup>30</sup>

6       Mr. Flaherty had better luck with seeking a sentencing reduction  
7 under Sentencing Guideline Amendment 782. After a Ninth Circuit  
8 remand, this Court reduced his sentence to 262 months.<sup>31</sup>

9       In this Motion, Mr. Flaherty seeks a sentencing modification based  
10 on “compelling and extraordinary circumstances” pursuant to the First  
11 Step Act and 18 U.S.C. § 3582(c)(1)(A).

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17<sup>28</sup> (*See* ECF 1669 (sentencing minute entry); *see also* 1671 (Judgment).)

18<sup>29</sup> (*See* ECF 2458.)

19<sup>30</sup> (*See* ECF 2517.)

<sup>31</sup> (*See* ECF 2826, 2827; *see also* ECF 2811 (Ninth Circuit decision).)

## 1           **LEGAL FRAMEWORK FOR COMPASSIONATE RELEASE**

### 2           **A. Compassionate Release Before the First Step Act**

3           The compassionate release statute empowers courts to reduce a  
4 defendant's sentence whenever "extraordinary and compelling reasons  
5 warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i) (2020 rev. ed.).

6           The statute was first enacted as part of the Comprehensive Crime  
7 Control Act of 1984 to serve as a "safety valve" to enable judges to  
8 reassess whether a sentence reduction was warranted by factors  
9 previously addressed through the abolished parole system. The  
10 Sentencing Commission defined "extraordinary and compelling reasons"  
11 as including medical conditions, age, family circumstances, and "other  
12 reasons." U.S. Sentencing Guideline Manual § 1B1.13, app. n.1(A) (2018).

13           As originally enacted, the statute left sole discretion for filing  
14 compassionate release motions with the Director of the Bureau of Prisons  
15 ("BOP"). Over the course of three decades, the BOP rarely filed motions  
16 on behalf of inmates who met the eligibility criteria.<sup>32</sup>

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<sup>32</sup> Until 2013, on average, "only [twenty-four] inmates were released each year" through the BOP program. *See* Hearing on Compassionate Release and the Conditions of Supervision before the U.S. Sentencing Comm'n (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice); *see*

#### B. Compassionate Release After the First Step Act

2 On December 21, 2018, the First Step Act became operative  
3 changing the applicable framework by allowing defendants to directly  
4 petition courts for relief instead of resting the decision solely with  
5 wardens. *See* 18 U.S.C. § 3582(c)(1)(A) (2020 rev. ed.). The  
6 compassionate release statute, as amended by the First Step Act, allows  
7 district courts to grant relief whenever “extraordinary and compelling  
8 reasons” warrant a reduction, consistent with the sentencing factors  
9 outlined in 18 U.S.C. § 3553(a) and the Sentencing Commission’s  
10 applicable policy statements, regardless of BOP’s position.

11       Thus, a district court can grant a sentencing reduction under 18  
12 U.S.C. § 3582(c)(1)(A), where “extraordinary and compelling reasons  
13 warrant such a reduction” and “a reduction [would be] consistent with  
14 applicable policy statements issued by the Sentencing Commission.” The  
15 Sentencing Commission also directs courts to consider whether the  
16 defendant poses “a danger to the safety of any other person or to the

<sup>19</sup> also *United States v. Brooker*, 976 F.3d 228, 230-33 (2d Cir. 2020) (2d Cir. 2020) (detailing the history of statutory compassionate release).

1 community, as provided in 18 U.S.C. § 3142(g)," and "the factors set forth  
 2 in 18 U.S.C. § 3553(a), to the extent they are applicable." U.S. Sentencing  
 3 Guideline Manual. § 1B1.13 (2018).<sup>33</sup>

4 Mr. Flaherty's request for compassionate release does not ask the  
 5 Court to review a BOP decision. Rather, the statutory responsibility to  
 6 decide whether to extend compassionate release to Flaherty rests solely  
 7 with the Court.<sup>34</sup> Since the First Step Act took effect, courts have  
 8 continued to expand compassionate release, finding "extraordinary and  
 9 compelling reasons" in circumstances beyond the factors of age, medical  
 10 condition, and family needs BOP has typically relied upon. *See Brooker*,  
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13 <sup>33</sup> However, as described in the next subsection, the Sentencing Guideline  
 14 Manual § 1B1.13 compassionate release policy statement is out of date and not  
 15 responsive to the First Step Act's changes. *See United States v. Brooker*, 976  
 16 F.3d 228, 237 (2d Cir. 2020); *United States v. Jones*, No. 20-3701 (6th Cir. Nov.  
 17 20, 2020); *United States v. Gunn*, No. 20-1959 (7th Cir. Nov. 20, 2020).

18 <sup>34</sup> *United States v. Jones*, outlines the three part-test for determining  
 19 compassionate release eligibility:

- 16 (1) "find[ing]" extraordinary and compelling reasons merit a  
 17 sentence reduction;8 (2) "find[ing]" that the reduction is consistent  
 18 with "applicable" Sentencing Commission policy statements; and  
 19 (3) "considering" the "applicable" § 3553(a) factors.

*Jones*, slip. opin, at 9 (citing *United States v. Ruffin*, 978 F.3d 1000 (6th  
 Cir. 2020) (quoting § 3582(c)(1)(A))).

1 976 F.3d at 237; *United States v. McCoy*, No. 20-6821, 2020 WL 7050097  
2 (4th Cir. Dec. 2, 2020).

3       **C. United States Sentencing Guideline Section 1B1.13 Does Not**  
4       **Apply to this Motion**

5       Title 18 U.S.C. § 3582(c)(2) directs courts to consider “applicable”  
6 policy statements issued by the Sentencing Commission.” The problem  
7 with this directive is there is no applicable policy statement. *United*  
8 *States v. Brooker*, 976 F.3d 228 (2d Cir. 2020); *United States v. Jones*,  
9 No. 20-3701, 2020 WL 6817488 (6th Cir. Nov. 20, 2020); *United States v.*  
10 *Gunn*, No. 20-1959, 2020 WL 6813995 (7th Cir. Nov. 20, 2020), and  
11 *United States v. McCoy*, No. 20-6821, 2020 WL 7050097 (4th Cir. Dec. 2,  
12 2020), all hold that, because the Sentencing Commission has not yet  
13 updated United States Sentencing Guideline Manual § 1B1.13, it does  
14 not apply to First Step Act compassionate release motions filed by  
15 defendant-inmates. *See Brooker*, 976 F.3d at 245 (“it is manifest that  
16 [§1B1.13’s] language is clearly outdated and cannot be fully applicable”).

17       To explain, the text of § 3582(c)(1)(A) directs courts to ensure “a  
18 reduction is consistent with applicable policy statements issued by the  
19 Sentencing Commission.” The most recent Sentencing Guidelines

1 Manual, the 2018 edition, has a policy statement, § 1B1.13,  
2 implementing the compassionate-release statute. But this policy  
3 statement begins: “Upon motion of the Director of the Bureau of Prisons.”  
4 See *Gunn*, 2020 WL 6813995, at \*2. The section has not been updated to  
5 reflect the First Step Act’s substantial changes. It therefore only applies  
6 to motions for release filed by the Director of the Bureau of Prisons. See  
7 *Brooker*, 976 F.3d at 235-36 (explaining that § 1B1.13 survives, but only  
8 apply “to those motions the BOP has made”); accord *Gunn*, 2020 WL  
9 6813995, at \*2 (holding that, until § 1B1.13 is amended the Guidelines  
10 Manual “lacks an ‘applicable’ policy statement covering prisoner-  
11 initiated applications for compassionate release”); *McCoy*, 2020 WL  
12 70577, at \*9 (“In short, we agree with the Second Circuit and the  
13 emerging consensus in the district courts: There is as of now no  
14 “applicable” policy statement governing compassionate-release motions  
15 filed by defendants under the recently amended § 3582(c)(1)(A), and as a  
16 result, district courts are “empowered ... to consider any extraordinary  
17 and compelling reason for release that a defendant might raise.” (quoting  
18 *Brooker*, 976 F.3d at 230); see also *Jones*, 2020 WL 6817488, at \*9 (“In  
19

1 cases where incarcerated persons file motions for compassionate release,  
2 federal judges. . .have full discretion to define ‘extraordinary and  
3 compelling’ without consulting the policy statement § 1B1.13.).<sup>35</sup>

4 In sum, a district court abuses its discretion when it relies upon  
5 § 1B1.13 in deciding a compassionate release motion initiated by a prison  
6 inmate.

7 **COVID AND ITS IMPACT ON THE FEDERAL CUSTODIAL  
ENVIRONMENT**

8 **A. COVID-19 Surfaced then Spread**

9 On December 2019, a novel coronavirus—named COVID-19—  
10 surfaced in Hubei Province, China.<sup>36</sup> In what started as a regional  
11 outbreak, COVID-19 spread worldwide, infecting over 39 million people  
12 and killing more than a million people by mid-October, 2020.<sup>37</sup> Today,  
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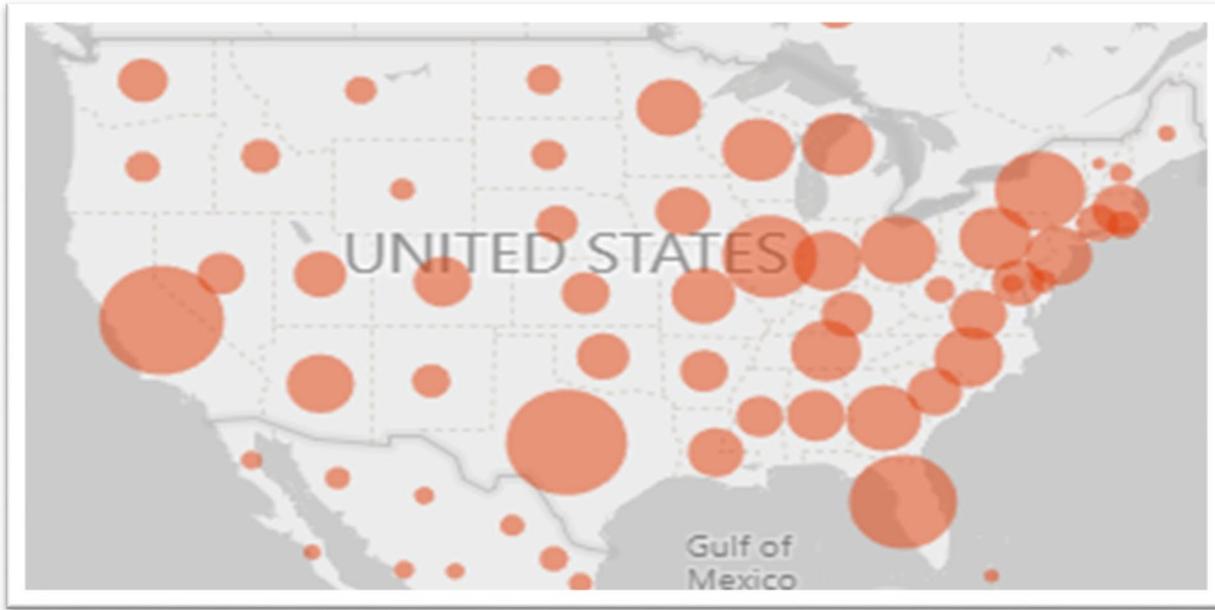
14 <sup>35</sup> The *McCoy* decision refers to the multi-appellant case *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020), as “*United States v. Zullo*.” The Harvard Blue Book, however, directs parties to “[o]mit all parties other than the first listed on each side.” *The Bluebook: A Uniform System of Citation* R.10.2.1 (a), at 97 (Columbia Law Review Ass’n et al. eds. 20th ed. 2015). The first name in the case caption is “Brooker,” the last name is “Zullo.”

17 <sup>36</sup> World Health Organization, Q&A on Covid-19, [bit.ly/WHO-Covid-19-QA](http://bit.ly/WHO-Covid-19-QA).

18 <sup>37</sup> *Coronavirus Map: Tracking the Global Outbreak*, The New York Times, October 16, 2020, [nyti.ms/NYT-Covid-19-World-Cases](http://nyti.ms/NYT-Covid-19-World-Cases).

1 December 11, 2020, that number stands at more than 71,334,932 infected  
2 and 1,599,323 deaths.<sup>38</sup>

3 *COVID-19 Map: December 11, 2020*



12 The United States has been particularly hard-hit with COVID-19  
13 infecting over 16.2 million in every state and territory, killing more than  
14 300,000 Americans.<sup>39</sup>

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18 <sup>38</sup> See Worldometer, *Coronavirus*, (Dec. 11, 2020),  
https://www.worldometers.info/coronavirus

19 <sup>39</sup> See *id.*

1           **B. BOP's Measures to Contain the Virus**

2           To combat COVID-19's spread, the BOP instituted a nationwide,  
3 phased response plan. Starting in early-April 2020, it:

- 4           - suspended social visit;  
5           - suspended legal visits (with limited exceptions);  
6           - suspended all programming (e.g., RDAP, classes, etc.); and  
7           - restricted inmate movement (i.e., inmates are confined to their  
8           cells for large portions of the day).<sup>40</sup>

9           The BOP also implemented a mandatory fourteen-day "quarantine"  
10          for all incarcerated individuals coming into BOP facilities, as well as all  
11          incarcerated individuals who report COVID-19 symptoms or a  
12          temperature greater than 100.4 degrees.<sup>41</sup> BOP places inmates who  
13          arrive symptomatic and/or test positive for COVID-19 in "medical  
14          isolation." "Medical isolation" is generally not a sanitary hospital room

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17          <sup>40</sup> See *BOP Modified Operations*, Federal Bureau of Prisons,  
18          [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp) (updated October 8,  
19          2020).

41 *Id.*

1 with an attached washroom; its placement in the “Special Housing Unit,  
2 also known as “the SHU” or “solitary confinement.”<sup>42</sup>

3 Placing symptomatic individuals in solitary for two weeks exceeds  
4 what experts agree is medically ethical. “Nearly every scientific inquiry  
5 into the effects of solitary confinement over the past 150 years has  
6 concluded that subjecting an individual to more than 10 days of  
7 involuntary segregation results in a distinct set of emotional, cognitive,  
8 social, and physical pathologies.”<sup>43</sup> Those pathologies include panic  
9 attacks, disordered thinking and paranoia, compulsive behavior like  
10 pacing and cleaning, difficulty concentrating and memory problems,  
11 hyperawareness and startle reactions, irritability, anger and despair.<sup>44</sup>

12 These compounding pathologies may cause an individual in  
13 solitary, particularly those with mental illness, to despair causing  
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16 <sup>42</sup> *Id.*

17 <sup>43</sup> Cloud, Drucker, Brown, and Parsons, *Public Health and Solitary in the*  
18 *United States*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4265928/>

19 <sup>44</sup> See *id.* (A Public Health Ethical Framework section)

1 suicidal ideation to take hold. The United Nations puts it more bluntly:  
2 solitary exceeding 15 days “rises to the level of torture.”<sup>45</sup>

3 In short, the carceral environment is a particularly bad place to be  
4 during an epidemic. BOP’s measure to contain that risk, while laudable,  
5 are destined to, and have, failed.

6 There is another insidious aspect to making quarantine punitive—  
7 it makes the prison environment more unsafe because it causes inmates  
8 to avoid reporting exposure and symptoms. Dr. Venters discusses this  
9 effect, and much more, in his report on how the federal Bureau of Prisons  
10 facility Lompoc has responded to COVID-19. <sup>46</sup>

### 11 C. Dr. Venters’ Report

12 This Court is fortunate to have a report that outlines the conditions  
13 at Lompoc. Dr. Venter submitted the report in case CV 20-4450-CBM-  
14 (PVCx), *Torres et al. v. Milusnic et al.*, in order to allow the court to have  
15 a neutral appraisal of the prison’s conditions.

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18 <sup>45</sup> See <http://bit.ly/SolitaryReport-June2020> at 3 (last accessed Nov. 20, 2020).

19 <sup>46</sup> (See Ex. C.)

1 Dr. Venter conducted the inspection on September 1st, and 2nd,  
2 2020.<sup>47</sup> The BOP Lompoc complex is comprised of three administrative  
3 areas, FCI Lompoc, also referred to as “the Low” because of its low  
4 security status, USP Lompoc, also referred to as “the Medium”, for the  
5 same reason, and two camp areas, North and South Camps. The first day  
6 of inspection focused on FCI Lompoc (the Low) and the second on USP  
7 Lompoc (the Medium) and the two camp areas.<sup>48</sup>

8 In general, the COVID-19 outbreak at Lompoc “has been one of the  
9 nation’s most overwhelming.”<sup>49</sup> The census of the BOP Lompoc facility  
10 was approximately 2,200. BOP data on September 1, 2020, identified 953  
11 detained people as “recovered” from COVID-19 and three inmates as  
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15 <sup>47</sup> (*See id.* at 4.)

16 <sup>48</sup> (*See id.*) BOP houses Mr. Flaherty in the North Camp.

17 <sup>49</sup> (*Id.* at 2.) In July 2020, the Office of the Inspector General of the U.S.  
18 Department of Justice issued a report on the COVID-19 response at Lompoc.  
19 (*See Ex. D.*) Like Dr. Venter’s report, it several areas of deficiency in the  
response, including inadequate staffing of health and correctional staff, lack of  
adequate testing and screening of detained people, inadequate leadership,  
shortage of personal protective equipment and extremely limited use of home  
confinement as an alternative for high-risk people.

1 actively infected.<sup>50</sup> BOP reports four people have died from COVID-19  
2 related illness.<sup>51</sup>

3 Dr. Venter describes conditions in the camps and his discussions  
4 with inmates housed therein.<sup>52</sup> There appeared to be ample cleaning  
5 supplies but some bunks were situated close to each other.

6 The inmates confirmed that, as in the rest of the facility, sick call  
7 requests take more than a week for response.<sup>53</sup> Chronic care patients  
8 have not received treatment for more than six months.<sup>54</sup> Approximately  
9 a quarter of people in the camps reported lingering COVID-19 symptoms  
10 including pain with breathing, headaches, loss of taste and smell, joint  
11 stiffness, and weakness.<sup>55</sup> “None of them reported being seen after  
12 leaving medical isolation to be asked about ongoing COVID-19 symptoms  
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15 <sup>50</sup> (*See Ex. C, at 2.*)

16 <sup>51</sup> (*Id.*)

17 <sup>52</sup> (*See id. at 10-13.*)

18 <sup>53</sup> (*See id. at 12.*)

19 <sup>54</sup> (*See id.*)

<sup>55</sup> (*See id.*)

1 or disability and several reported that they had submitted multiple sick  
2 call requests for these symptoms without being seen.”<sup>56</sup>

3 Inmates reported difficulty accessing care when they became ill  
4 with COVID-19, “as well as concerns about having been labelled  
5 asymptomatic when they tested positive despite being actually ill with  
6 COVID-19 weeks earlier.”<sup>57</sup>

7 There is an increased chance of an inmate introducing COVID-19  
8 into one of the camps because BOP does not screen them from work  
9 details.<sup>58</sup> BOP officials do not wear masks, “including the count officers  
10 who rotate between units.” BOP does not attempt to implement or  
11 promote social distancing in medication or clinic que.<sup>59</sup>

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<sup>56</sup> (*See id.* at 12-13.)

17 <sup>57</sup> (*Id.* at 13.)

18 <sup>58</sup> (*See id.*)

19 <sup>59</sup> (*See id.*)

1 Several people expressed reluctance to report COVID-19 symptoms  
2 out of fear of the prison transferring them to quarantine which “operated  
3 like solitary confinement.”<sup>60</sup>

4 Dr. Venter presents an unbiased analysis that highlights areas  
5 where Lompoc’s COVID-19 response is positive.<sup>61</sup> For instance, the  
6 prison handles staff screening well and has, or used to have, a dedicated  
7 COVID-19 hospital unit.<sup>62</sup> Yet there are areas of deficiencies.

8 For instance, Dr. Venter found several areas where Lompoc fails to  
9 adequately screen for the virus.<sup>63</sup> “Taken together, these screening  
10 deficiencies increase the risk that patients will become seriously ill or die  
11 from COVID-19 and also increase the potential spread of the virus.”<sup>64</sup>

12 Lompoc medical personnel fail to timely respond to sick calls and  
13 chronic care. This is not a trivial failing as “[t]hese encounters are central

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16<sup>60</sup> (*Id.*)

17<sup>61</sup> (*See id.* at 19-20.)

18<sup>62</sup> (*See id.* at 19.)

19<sup>63</sup> (*See id.* at 21-22.)

<sup>64</sup> (*Id.* at 21.)

1 to the facility[’s] COVID-19 response.”<sup>65</sup> The lack of appropriate chronic  
2 care is salient to Mr. Flaherty as it will cause his kidney disease to unduly  
3 progress.<sup>66</sup>

4 As self-reported by numerous inmates, Dr. Venter confirms that  
5 there is a lack of infection control in housing areas.<sup>67</sup> For instance, the  
6 Centers for Disease Control has clearly identified the ability to dry one’s  
7 hands with a single use paper towel or air dryer as critical to COVID-19  
8 response.<sup>68</sup>

9 This was not possible for all inmates:

10 In one housing area I was told by BOP leadership that  
11 paper towels were not needed because of the presence  
12 of a hand dryer. I tested the hand dryer and it was  
13 broken. Staff and detained people in the unit confirmed  
14 that it had not worked for over one year.<sup>69</sup>

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15 <sup>65</sup> (*Id.* at 22.)

16 <sup>66</sup> (*Cf. id.* at 23 (“almost all people in the chronic care service” report it takes  
“far longer than the 3-6-month window” claimed by BOP staff”).

17 <sup>67</sup> (*See id.* at 24-25.)

18 <sup>68</sup> COVID-19: *Handwashing* (Sept. 21, 2020)  
<https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/handwashing.htm>.

19 <sup>69</sup> (Ex. C, at 24.)

1 Finally, Dr. Venter outlined the negative impacts of the prison's  
2 punitive approach to quarantine.<sup>70</sup> "While not directly related to  
3 quarantine, the intimidation and threatening of detained people to  
4 behave in a manner prescribed by correctional staff during the inspection  
5 is another very concerning example of a punitive response to the COVID-  
6 19 outbreak in the facility."<sup>71</sup>

7 Dr. Venter makes a number of recommendations to improve  
8 Lompoc's conditions and ends with this summary:

9 The COVID-19 outbreak at BOP Lompoc has been one  
10 of the prison system's most expansive, in terms of the  
11 percentage of detained people who were infected as  
12 well as those who died. The response of the BOP and  
13 PHS to this unprecedented challenge at Lompoc  
14 exhibits both significant strengths and serious  
15 deficiencies. Overall, the COVID-19 response at BOP  
Lompoc is characterized by some evidence-based  
strategies being superimposed on a grossly inadequate  
COVID-19 cases, slow the spread of the virus and  
protect high risk patients have been incompletely  
implemented. Many of the deficiencies in health access  
flow directly from chronic, unaddressed understaffing.  
This problem has been previously identified but I am  
very concerned by facility leadership's inability to  
discuss or quantify how these shortages relate to the  
COVID-19 response.<sup>72</sup>

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17 <sup>70</sup> (*See id.* at 25.)

18 <sup>71</sup> (*Id.*)

19 <sup>72</sup> (*Id.* at 28-29.)

1           Implementing Dr. Venter's recommendations "will take time."<sup>73</sup> It  
2 is unclear whether BOP was implemented any of Dr. Venter's  
3 suggestions.

4           **D. Mr. Flaherty Cannot Protect Himself While in Prison Custody**

5           Judges across the country are learning that prisons are "powder  
6 kegs for infection" that have allowed "the COVID-19 virus to spread with  
7 uncommon and frightening speed." *United States v. Rountree*, 460  
8 F.Supp.3d 224, 232 (N.D.N.Y. 2020) (citation omitted); *see also United*  
9 *States v. Young*, 460 F.Supp.3d 71, (D. Mass. 2020) ("As the virus can  
10 appear suddenly and spread quickly in the prison population, I cannot  
11 find that Ms. Young's risk of exposure is insignificant.").

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<sup>73</sup> (*Id.* at 29.)

1 Mass virus spread is exactly what happened at Lompoc. The  
2 catastrophic outbreak at Lompoc was documented in the news,<sup>74</sup> district  
3 court orders, Dr. Venters' Report, and in a class action lawsuit by the  
4 ACLU.<sup>75</sup>

5 **Los Angeles Times**

6 CALIFORNIA

7 **70% of inmates test positive for**  
**coronavirus at Lompoc federal prison**

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15 The Federal Correctional Institution in Lompoc, which houses low- to medium-security inmates, is on the same grounds as the  
Lompoc Federal Prison Camp. (Jeffrey May/Associated Press)

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17 <sup>74</sup> Tyler Hayden, *Lompoc Prison Explodes with Active COVID-19 Cases*, Santa  
18 Barbara Independent (May 13, 2020), <https://bit.ly/3gUbC4D>.

19 <sup>75</sup> See *Torres v. Carvajal*, No. 20-cv-4450 (C.D. Cal. May 16, 2020) (class-action  
complaint).

1 As of December 14, 2020, the BOP lists the following information  
 2 for Lompoc:

Facility	Inmates Positive	Staff Positive	Inmate Deaths	Staff Deaths	Inmates Recovered	Staff Recovered
Lompoc USP	1	1	2	0	139	28
Lompoc FCI	0	0	2	0	691	19

10 There are reasons to question the reported numbers.

11 First, BOP regularly transfer inmates between the two facilities.  
 12 The outbreak intertwines between the USP and the FCI.<sup>76</sup>

13 Second, the BOP's classification of inmates as "recovered" is  
 14 problematic. The class action lawsuit contains a declaration of Shamsher  
 15 Samra, M.D., Assistant Professor of Clinical Medicine at University of  
 16 California, Los Angeles and a faculty member in the Department of

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 19 <sup>76</sup> *Carvajal*, No. 20-cv-4450 at 24.

1 Emergency Medicine at Harbor-UCLA.<sup>77</sup> Dr. Samra works in the LA  
2 County jails after receiving his M.D. from Harvard Medical School.<sup>78</sup>

3 Dr. Samra describes the following problems with BOP's  
4 classification of "recovered" inmates:

5       15. Moreover, it is my understanding that BOP now contends that  
6 a substantial number of the prisoners who recently tested positive have "recovered."  
7 To the extent these prisoners have actually recovered from the illness, that does not  
8 absolve the need for preventive measures. In particular, it is not yet clear whether  
people who have been infected develop immunity against future infection by  
9 COVID-19.

10      16. Furthermore, if it is true that BOP is classifying prisoners as  
11 "recovered" without re-testing them, that would be very problematic. Indeed, the  
12 need for continued rigorous preventive measures is only heightened if BOP has not  
13 relied on appropriate methods for determining whether prisoners have in fact  
14 recovered. In an ideal scenario, an individual would only be deemed "recovered"  
15 after testing negative. Relying instead, for instance, on patient reports of symptoms  
16 may not be sufficient in a correctional setting, where prisoners may be reluctant to  
17 share information with staff. Furthermore, asymptomatic individuals can still be  
18 carriers of the disease. And in a large communal living space, where social  
19 distancing cannot be strictly adhered to, individuals should be tested regularly in  
order to quickly identify and isolate anyone who may contract COVID-19 before it  
spreads through the population.

As detailed, *supra*, Doctor Homer Venters report, submitted in  
Central District of California No. 2:20-cv-04450-CBM-PVC, ECF 101-1,

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<sup>77</sup> Declaration of Shamsher Samra, M.D., exhibit in *Carvajal*, No. 20-cv-4450.

<sup>78</sup> *Id.*

1 provides a comprehensive overview of the situation in FCI Lompoc.<sup>79</sup>  
2 Review of this report provides the court with insight into the conditions  
3 in this facility.

4 This Court would not be alone in its concern for vulnerable  
5 defendants at Lompoc. District courts around the country have granted  
6 compassionate release for nonviolent defendants with health concerns  
7 putting them at risk of death or hospitalization, particularly at Lompoc:

8       *United States v. Kamaka*, 2020 WL 2820139 (D. Haw. May 29,  
9 2020) (granting emergency motion for compassionate release for  
10 Lompoc inmate: 49-year-old defendant with hypertension. The  
Court recognized that the “true case count may be much higher”  
than reported by BOP);

11       *United States v. Gorai*, 2020 WL 1975372 (D. Nev. Apr. 24, 2020)  
12 (granting compassionate release for asthmatic Lompoc inmate);

13       *United States v. Young*, 2020 WL 2614745 (W.D. Wash. May 22,  
14 2020) (granting compassionate release to a 64-year-old black  
Lompoc inmate with hypertension and chronic kidney disease);

15       *United States v. Barber*, 466 F.Supp.3d 1127 (D. Or. 2020)  
16 (granting compassionate release to Lompoc inmate with  
hypertension and diabetes, who tested positive for the coronavirus);

17       *United States v. Connell*, 2020 WL 2315858 (N.D. Cal. May 8, 2020)  
18 (published order) (granting compassionate release for 69-year-old  
Lompoc inmate with hypertension, high cholesterol, and diabetes);

19 <sup>79</sup> (Attached as Exhibit D.)

1                   *United States v. Pippin*, 2020 WL 2602140 (W.D. Wash. May 20,  
2 2020) (granting compassionate release to Lompoc inmate with  
3 pancytopenia, which made him particularly vulnerable to COVID-  
4 19);

5                   *United States v. Robinson*, 2020 WL 1982872 (N.D. Cal. Apr. 27,  
6 2020) (granting compassionate release to Lompoc inmate who  
7 suffered from hypertension and psoriasis requiring  
immunosuppressant medications: “Lompoc Prison is currently  
battling one of the most serious COVID-19 outbreaks in the  
nation.”).

8                   Lompoc is simply too dangerous for Mr. Flaherty given his chronic  
9 kidney condition.

10                  In sum, Mr. Flaherty has a confirmed COVID-19 risk factor—  
11 chronic kidney disease—and is housed in an institute where the virus  
12 has been prevalent in the past and not managed well. The facility is  
13 understaffed and ill-equipped to handle his chronic condition. Mr.  
14 Flaherty is a strong candidate for a modification of his sentence under 18  
15 U.S.C. § 3582(c)(1)(A)(i).

1        THIS COURT SHOULD PLACE MOVANT FLAHERTY ON  
2        HOME CONFINEMENT FOR THE REMAINDER OF HIS  
3        SENTENCE BECAUSE HE MEETS THE LEGAL  
4        REQUIREMENTS FOR COMPASSIONATE RELEASE AND  
5        EQUITY REQUIRES THAT RESULT

6                  **A. Flaherty has Met the Exhaustion Requirement**

7        Pursuant to 18 U.S.C. § 3582(c)(1)(A), a defendant must exhaust  
8        administrative remedies with the BOP or wait thirty days after  
9        submitting a request for compassionate release to the warden, whichever  
10      comes first. *See* 18 U.S.C. § 3582(c)(1)(A) (2020 rev. ed.). Mr. Flaherty  
11      has met those requirements.

12       Exhibit B to this filing details Mr. Flaherty's efforts to exhaust his  
13      administrative remedies. He filed a request for "compassionate release"  
14      on August 5, 2020.<sup>80</sup> Lompoc officials took more than thirty days to  
15      respond.<sup>81</sup> Therefore, Mr. Flaherty has met § 3582(c)(1)(A)'s modest  
16      exhaustion requirements. *Cf. United States v. Burill*, 445 F.Supp.3d 22,  
17      (N.D. Cal. 2020) (explaining inmate Burill exhausted his request by  
18      emailing the Associate Warden even though the government maintained

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18      <sup>80</sup> (*See* Ex. B, at 1-3.)

19      <sup>81</sup> (*See id.* at 9.)

1 that the prison “did not understand [Burill’s] email to be a submitted  
2 request for a sentence reduction within the meaning of 18 U.S.C. section  
3 3282”).

4 Mr. Flaherty went beyond these requirements as he filed an appeal  
5 of the warden’s decision; also known as a BP-9 appeal.<sup>82</sup> At this time,  
6 counsel for Flaherty does not know the status of that appeal. However,  
7 Mr. Flaherty did correspond with counsel on November 7, 2020, by way  
8 of the prison’s inmate email system stating that he made a formal request  
9 for release “for the third time.”

10 Mr. Flaherty meets 18 U.S.C. § 3582(c)(1)(A)’s exhaustion  
11 requirements.

12 **B. Mr. Flaherty Seeks a Modification of his Sentence**

13 Mr. Flaherty seeks to convert his remaining custodial sentence into  
14 a term of supervised release with a home confinement condition. His  
15 request is grounded in, and authorized by, 18 U.S.C. § 3582(c)(1)(A).<sup>83</sup>

16 \_\_\_\_\_  
17 <sup>82</sup> (*See id.* at 10-11.)

18 <sup>83</sup> The term “compassionate release” is a “misnomer.” *United States v. Brooker*,  
19 976 F.3d 228, 237 (2d Cir. 2020). Title “18 U.S.C. § 3582(c)(1)(A):

in fact speaks of sentence reductions. A district court could,  
for instance, reduce but not eliminate a defendant’s prison

1       In § 3582, Congress explicitly empowered courts to convert time  
2 remaining on custodial sentences to home confinement via supervision.  
3 The Court “may reduce the term of imprisonment” and “may impose a  
4 term of probation or supervised release with or without conditions that  
5 does not exceed the unserved portion of the original term of  
6 imprisonment.” 18 U.S.C. § 3582(c)(1)(A) (2020 rev. ed.); *accord United*  
7 *States v. McCoy*, CA No. 20-6821, 2020 WL 7050097, at \*2 (4th Cir. Dec.  
8 2, 2020) (describing the First Step Act’s changes to federal sentencing  
9 law). The power lies in that statute. *See United States v. Jones*, No. 20-  
10 3701, 2020 WL 6817488, at \*3 n.7 (7th Cir. Nov. 20, 2020).

11           Statutory and case law authority support the remedy Mr. Flaherty  
12 seeks.<sup>84</sup>

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13  
14           sentence, or end the term of imprisonment but impose a  
15 significant term of probation or supervised release in its  
16 place. *Id.* Beyond this, a district court’s discretion in this  
area—as in all sentencing matters—is broad.

17           *Id.* (citing *United States v. Cavera*, 550 F.3d 180, 188 (2d Cir. 2008) (en banc)).

18           <sup>84</sup> The United States Attorney’s Office sometimes misinterprets this request  
19 for relief as an attempt to convince the Bureau of Prisons to release a prisoner  
to home confinement under 18 U.S.C. § 3624(c). It is true that BOP has  
exclusive authority under that provision. It is also irrelevant to this motion.

1           **C. COVID-19 Poses a Serious Problem for Penal Institutions**

2           On March 11, 2020, the World Health Organization (“WHO”)  
3 officially classified the spread of COVID-19, the disease caused by the  
4 novel coronavirus, as a pandemic.<sup>85</sup> On March 13, 2020, the President  
5 declared a national emergency due to the evolving threat of the  
6 coronavirus (COVID-19) outbreak. To slow the spread of the disease, the  
7 Centers for Disease Control and Prevention [hereinafter CDC] has  
8 broadly advised people to take basic preventive actions, such as avoiding  
9 crowds, staying six feet away from others, keeping surfaces disinfected,  
10 and frequently washing their hands or using hand sanitizer.<sup>86</sup>

11           These precautions are difficult for incarcerated individuals. Public  
12 health experts warn that incarcerated individuals “are at special risk of  
13 infection” and are “less able to participate in proactive measures to keep  
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<sup>85</sup> *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19>.

18           <sup>86</sup> *Id.*

1 themselves safe.”<sup>87</sup> The conditions in BOP facilities are therefore,  
2 unfortunately, a hospitable environment for COVID-19 to spread.<sup>88</sup>

3       Whatever precautions and procedures BOP undertake to safeguard  
4 its inmates, it is plain that prisons are a dangerous place to be during a  
5 pandemic.

6       Epidemiology researchers from Washington State University,  
7 University of Pennsylvania, University of Tennessee, and the ACLU  
8 estimate that jails alone, by spreading infections to the community, may  
9 increase the total coronavirus death count “by almost another 100,000”

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<sup>87</sup> *Achieving a Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States* (March 2, 2020), [https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final\\_covid-19\\_letter\\_from\\_public\\_health\\_and\\_legal\\_experts.pdf](https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf)

<sup>88</sup> Joseph A. Bick, *Infection Control in Jails and Prisons*, Clinical Infectious Diseases 45(8): 1047-1055 (2007), available at <https://doi.org/10.1086/521910>; Vice, “Sick Staff, Inmate Transfers, and No Tests: How the U.S. is Failing Federal Inmates as Coronavirus Hits” (Mar. 24, 2020), available at [https://www.vice.com/en\\_us/article/jge4vg/sick-staff-inmate-transfers-and-no-tests-how-the-us-is-failing-federal-inmates-as-coronavirus-hits](https://www.vice.com/en_us/article/jge4vg/sick-staff-inmate-transfers-and-no-tests-how-the-us-is-failing-federal-inmates-as-coronavirus-hits).

19

1 people.<sup>89</sup> BOP simply cannot box hundreds of inmates into a dormitory  
2 and expect anything other than rapid viral spread.<sup>90</sup>

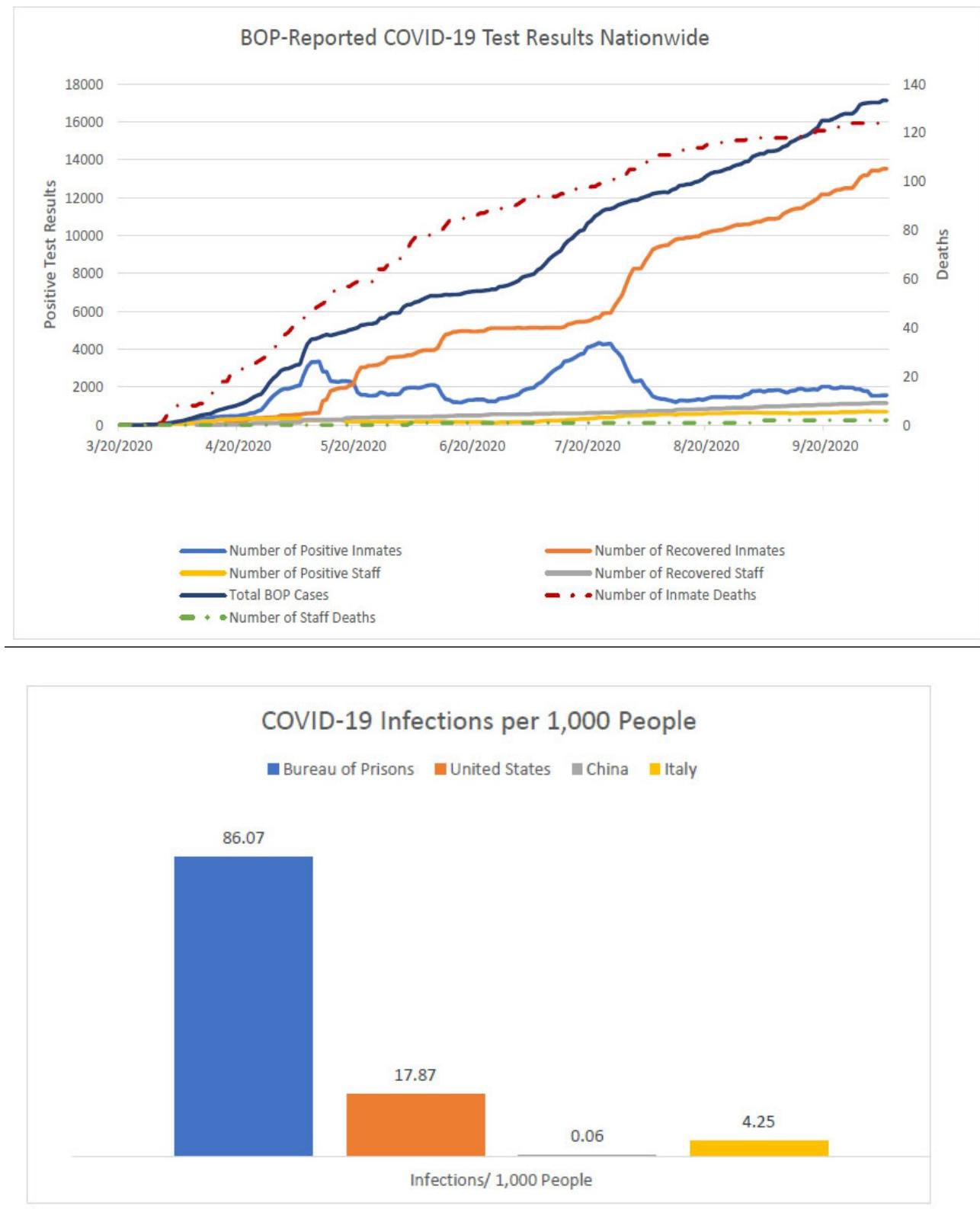
3 These graphs demonstrates BOP's inability to control COVID-19's  
4 spread:

<sup>89</sup> ACLU, *COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates, Due to Failures to Reduce Jails*, at 1 (April 2020) (available at <https://bit.ly/2OdejRb>); accord Michael Olive, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW Charitable Trusts (July 1, 2020), available at: <https://bit.ly/3fag9yc> (“Not only can the virus be brought into jails and prisons, but it also can leave those facilities and spread widely into surrounding communities and beyond.”).

<sup>90</sup> Joseph J. Amon, an infectious disease epidemiologist and Director of Global Health and Clinical Professor in the department of Community Health and Prevention at the Drexel Dornsife School of Public Health, has studied infectious diseases in detention settings and states:

13 Detention facilities have even greater risk of infectious  
14 spread because of conditions of crowding, the proportion of  
15 vulnerable people detained, and often scant medical care.  
16 People live in close quarters and are also subject to security  
17 measures which prohibit successful “social distancing” that  
is needed to effectively prevent the spread of COVID-19.  
Toilets, sinks, and showers are shared, without disinfection  
between use. Food preparation and food service is  
communal, with little opportunity for surface disinfection.  
The crowded conditions, in both sleeping areas and social  
areas, and the shared objects (bathrooms, sinks, etc.) will  
facilitate transmission.

<sup>18</sup> *United States v. Rodriguez*, 451 F.Supp.3d 392, 403 (E.D. Penn. 2020).



1 There is, however a solution—reduce the prison population. Courts  
2 from around the country have heeded the call from legal and medical  
3 experts by releasing vulnerable inmates from BOP facilities.<sup>91</sup> Granting  
4 compassionate release reduces COVID-19 risks for both inmates and  
staff.

5 **D. Mr. Flaherty is at High Risk of Hospitalization or Death Due to**  
6 **Coronavirus and the Conditions at Lompoc**

7 In evaluating the coronavirus outbreak, courts have found  
8 extraordinary and compelling reasons for compassionate release when an  
9 inmate shows both a particularized susceptibility to the disease and a  
10 particularized risk of contracting the disease at his prison facility. *See*

11  
12 <sup>91</sup> In 2019, federal courts granted 145 compassionate release motions; incarcerated individuals filed ninety-six (67.1%) of the motions, and the BOP filed the other forty-seven (32.9%). *United States v. Jones*, 2020 WL 6817488, at \*5 (citing U.S. Sentencing Commission, *The First Step Act of 2018: One Year of Implementation*, at 47 & n.43 (Aug. 2020)). Since then the pace has increased markedly:

13 We are now well into the second year of the First Step Act's  
14 implementation, a year defined by COVID-19." *Id.* The BOP denied or ignored more than 98% of compassionate release requests in the first three months of the pandemic. Now unhindered by the BOP's procedural bars, incarcerated persons' filing and federal courts' granting § 3582(c)(1)(A) motions have surged this year. 10,940 federal prisoners applied for compassionate release between March and May 2020, and federal courts have compassionately released an estimated 1,700 persons in 2020 so far.

15  
16  
17  
18  
19 *Id.* (citation sources omitted).

1     *United States v. Feiling*, 453 F.Supp.3d 832, 841 (E.D. Va. 2020) (citing,  
2     *inter alia*, *United States v. Edwards*, 451 F.Supp.3d 562, 567-69 (W.D.  
3     Va. 2020)). Several courts have held that “the fear of contracting a  
4     communicable disease” alone cannot be considered an “extraordinary and  
5     compelling reason” to justify a sentence modification. *Id.* (citing *United*  
6     *States v. Clark*, 451 F.Supp.3d 651, 655-56 (M.D. La. 2020) (internal  
7     quotation marks and emphasis omitted)).

8              That said, the Court is not cabined to considerations about COVID-  
9     19 and its impact in what factors it may consider in determining whether  
10    “extraordinary and compelling” conditions exist. *See United States v.*  
11   *Coy*, 2020 WL 7050097, \*9 (Dec. 2, 2020) (“In short, we agree with the  
12   Second Circuit and the emerging consensus in the district courts: There  
13   is as of now no “applicable” policy statement governing compassionate-  
14   release motions filed by defendants under the recently amended  
15   § 3582(c)(1)(A), and as a result, district courts are “empowered. . .to  
16   consider any extraordinary and compelling reason for release that a  
17   defendant might raise.” (citing *Zullo*, 976 F.3d at 230.); *see also United*  
18   *States v. Rodriguez*, 451 F.Supp.3d 392, 396 (E.D. Penn. 2020) (Congress  
19

1 never defined the term “extraordinary and compelling reasons,” except to  
2 state that “[r]ehabilitation ... alone” does not suffice (citing 18 U.S.C.  
3 § 994(t) . . . and § 1B1.13 is “clearly outdated”).

4 Mr. Flaherty’s advances more than a general fear of contracting  
5 COVID-19. He has a chronic, incurable, condition—Stage III kidney  
6 disease.<sup>92</sup> As documented in Dr. Venter’s report, Lompoc is short-staffed  
7 and overwhelmed by dealing with the pandemic.<sup>93</sup> Mr. Flaherty will not  
8 receive the care he needs to combat his condition and prevent further  
9 deterioration.<sup>94</sup>

10 The Centers for Disease Control and Prevention (CDC) recognizes  
11 those with kidney disease “are at advanced risk of severe illness from the  
12 virus that contains COVID-19” regardless of age.<sup>95</sup> *See United States v.*  
13

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14 <sup>92</sup> (*See* Ex. F, at 1-2, 14-15, 25, 57.)

15 <sup>93</sup> (*See* Ex. C, at 12, 23.)

16 <sup>94</sup> For instance, controlling blood sugar and exercising at least thirty minutes  
17 a day helps to slow progression. *See* Managing Chronic Kidney Disease (Dec.  
15, 2020), <https://bit.ly/3oUfqFR>. Dietary restrictions help the process. (*See*  
*id.*) It is difficult for Mr. Flaherty to follow these guidelines in an environment  
where he has no choice but to eat the good given to him and lock-downs prevent  
exercise.

18 <sup>95</sup> *See* CDC, *People with Certain Medical Conditions* (Dec. 12, 2020),  
<https://bit.ly/3lQrx5V>

1 *Davidson*, 2020 WL 4877255, at \*18 (W.D. Penn. 2020) (“Here, there is  
 2 no doubt that Mr. Davidson is suffering from a serious medical condition  
 3 from which he is not expected to recover: chronic kidney disease.”). BOP  
 4 is unlikely to ameliorate this condition in custody. *Cf. id.*

5 Mr. Flaherty bases his motion for compassionate release on  
 6 conditions that have changed since his October 14, 2009 sentencing.<sup>96</sup> He  
 7 meets the criteria for release because the BOP is not equipped to contain  
 8 COVID-19 and protect vulnerable inmates such as Mr. Flaherty from  
 9 death or lasting complications. Nor will the facility be able to treat his  
 10 chronic condition.

11       **E. The Equities, and 3353(a) Factors, Support Movant Flaherty’s  
 12 Request for a Sentencing Modification**

13       Section 3582(c) directs courts to consider 18 U.S.C. § 3553(a)  
 14 sentencing factors when determining a petition for compassionate  
 15 release. *See* 18 U.S.C. § 3582(c)(1)(A) (2020 rev. ed.); *see also United*  
 16 *States v. Ruffian*, 978 F.3d 1000, 1003 (6th Cir. 2020) (explaining that  
 17 district courts may deny relief under § 3553(a) factors even if

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18  
 19 <sup>96</sup> (*See* ECF 183 (minutes of proceeding); *see also id.* at 185 (Judgment).)

1 “extraordinary and compelling” reasons would otherwise justify relief).  
2 Consideration of those factors supports Mr. Flaherty’s request for  
3 release.<sup>97</sup>

4           **1. Protect the Public from Further Crimes and Provide Needed  
5           Educational and Vocational Training:**

6           Mr. Flaherty has used his time in prison to better himself to avoid  
7 recidivism. He has taken a myriad of classes, including college credit  
8 courses.<sup>98</sup> *Cf. Pepper v. United States*, 562 U.S. 476, 490-93 (2011)

9           <sup>97</sup> Eighth Amendment concerns also support Mr. Flaherty’s request for a  
10 sentencing modification. As noted, however, by the Supreme Court of the  
United States:

11           [W]hen the State takes a person into its custody and holds him  
12 there against his will, the Constitution imposes upon it a  
corresponding duty to assume some responsibility for his safety  
and general well being.... The rationale for this principle is simple  
enough: when the State by the affirmative exercise of its power so  
restrains an individual's liberty \*631 that it renders him unable to  
care for himself, and at the same time fails to provide for his basic  
human needs—e.g., food, clothing, shelter, medical care, and  
reasonable safety—it transgresses the substantive limits on state  
action set by the Eighth Amendment.

13           *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200  
14 (1989).

15           Thus the Eighth Amendment is violated when the conditions at a jail  
16 deprive inmates of one or more basic human needs,. *See Wilson v. Seiter*, 501  
U.S. 294, 300 (1991). This basic human need for “reasonable safety” prohibits  
17 the housing of inmates in situations likely to lead to the spread of illness,  
sickness, and communicable disease. *See Helling v. McKinney*, 509 U.S. 25,  
33 (1993); *accord Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (stating  
18 that it is “cruel and unusual punishment to hold convicted criminals in unsafe  
conditions”).

19           <sup>98</sup> (*See Ex. A, at 6.*)

1 (allowing courts to consider favorable post-sentencing rehabilitation into  
 2 account during resentencing).

Individualized Reentry Plan - Program Review (Inmate Copy)				sequence#: 44862793
Dept. of Justice / Federal Bureau of Prisons				Team Date: 03-04-2020
File # for inmate: FLA0071, Report date: 03/03/2020				
SubFac	Action	Description	Start	Stop
SAF	C	PSYCO MINDFULNESS	04-03-2013	04-03-2013
SAF	C	R-AGRO - RELATIONSHIP SKILLS	04-03-2013	04-15-2013
SAF	C	R-JOB FAIR	04-29-2013	05-14-2013
SAF	C	10 KEY DATA ENTRY	05-07-2013	05-27-2013
SAF	C	ADVANCED KEYBOARDING	05-07-2013	05-27-2013
SAF	C	INTERMEDIATE KEYBOARDING	05-07-2013	05-27-2013
SAF	C	BEGINNING KEYBOARDING	05-07-2013	05-27-2013
SAF	C	R-HEALTH AWARE	05-07-2013	05-27-2013
HER	C	HEALTH 3400	05-29-2012	12-21-2013
HER	C	WORLD RELIGIONS-LOC	06-03-2012	02-21-2013
HER	C	MATH DEGREE-HLOC	06-29-2013	02-21-2013
HER	C	READY TO WORKS	06-29-2012	09-20-2012
HER	C	SOCIOLOGY 3400	06-18-2012	08-06-2012
HER	C	PRINCIPLES OF PSYCH-LOC	06-18-2012	08-06-2012
HER	C	HISTORY 1740G	06-18-2012	08-06-2012
HER	C	ENGLISH WRITING-LOC	06-17-2012	05-25-2012
HER	C	WESTERN CIVILIZATION 3400	06-17-2012	05-25-2012
HER	C	WESTERN CIVILIZATION-LOC	06-17-2012	05-25-2012
HER	C	HIST/IMPERIAL WAR-LOC	06-17-2012	05-25-2012
HER	C	ENGLISH PREREQUISITE-LOC	06-29-2011	12-22-2011
HER	C	ART APPRECIATION-LOC	06-23-2011	12-22-2011
HER	C	PHYSICAL ANTHROPOLOGY	06-23-2011	12-22-2011
HER	C	APDENTAL ASSISTANT	06-01-2010	05-15-2011
HER	C	INTRO TO SOCIO-LOC	01-15-2011	05-27-2011
HER	C	MATH 3300 DEGREE-HLOC	01-15-2011	05-27-2011
HER	C	POLITICAL SCIENCE-LOC	05-12-2010	12-12-2010
HER	C	BIG WORLD HST	05-12-2010	12-12-2010
HER	C	GENERAL PSYCH4400	06-07-2010	09-26-2010
HER	C	COUNSELING GUIDANCE-LOC	06-07-2010	09-26-2010
HER	C	TYING FM (12-IPMO)	04-09-2010	05-01-2010
<b>Discipline History (Last 6 months)</b>				
Hearing Date		Prohibited Acts		
** NO INCIDENT REPORTS FOUND IN LAST 6 MONTHS **				
<b>Current Care Assignments</b>				
Assignment	Description			Start
CARE1	HEALTHY OR SIMPLE CHRONIC CARE			01-01-2013
CARE1SH	CARE1 MENTAL HEALTH			05-05-2015
<b>Current Medical Duty Status: Assignments</b>				
Assignment	Description			Start
REG DUTY	NO MEDICAL RESTA-REGULAR DUTY			01-01-2013
YES FRS	CLEARED FOR FOOD SERVICE			01-01-2013
<b>Current Drug Assignments</b>				
Assignment	Description			Start
DWP DIAG	DRUG ABUSE DIAGNOSIS PENDING			05-15-2014
DU COMP	DRUG EDUCATION COMPLETE			04-01-2011
NR COMP	NRCS DRUG TREATMENT COMPLETE			03-19-2012
<b>FRP Details</b>				
<b>Most Recent Payment Plan</b>				
FRP Assignment:	COMPLT	FINANC RESP-COMPLETED	Start: 05-11-2010	
Inmate Decision:	AGREE	\$100.00	Frequency: SINGLE	
Payments past 6 months:	\$0.00		Obligation Balance: \$0.00	
<b>Financial Obligations</b>				
No.	Type	Amount	Balance	Status
Sentry Data as of 02-19-2020 Individualized Reentry Plan - Program Review (Inmate Copy) Page 2 of 4				



## Individualized Reentry Plan - Program Review (Inmate Copy)

SEQUENCE: 00862793

Team Date: 03-04-2020

Dept. of Justice / Federal Bureau of Prisons

Plan ID for Inmate: FLAXHORN, DORTIS ASLEX 68434-088

SubFac	Action	Description	Start	Stop
SAC	C	PSYC MINDFULNESS	04-03-2013	04-03-2013
SAC	C	R-AGRO - RELATIONSHIP SKILLS	04-03-2013	05-15-2013
SAC	C	R-JOB FAIR	04-29-2013	05-14-2013
SAC	C	10 KEY DATA ENTRY	05-07-2013	05-27-2013
SAC	C	ADVANCED KEYBOARDING	05-07-2013	05-27-2013
SAC	C	INTERMEDIATE KEYBOARDING	05-07-2013	05-27-2013
SAC	C	BEGINNING KEYBOARDING	05-07-2013	05-27-2013
SAC	C	R-111LT AIDS AWARE	05-07-2013	05-07-2013
HER	C	HEALTH 24-LCC	05-29-2013	12-21-2013
HER	C	WORLD RELIGIONS-LCC	05-29-2013	12-21-2013
HER	C	MATH 60/JAA DEGREE-H/CC	05-29-2013	12-21-2013
HER	C	READY TO WORK(7)	05-29-2013	09-20-2013
HER	C	SOCIOLOGY 24-LCC	05-29-2013	08-09-2013
HER	C	PRINCIPLES OF PSYCH/H/CC	05-29-2013	08-09-2013
HER	C	HISTORY 17-LCC	05-29-2013	08-09-2013
HER	C	ENGLISH WRITING3-LCC	05-29-2013	08-25-2013
HER	C	WESTERN CIVILIZATION 24-LCC	05-29-2013	08-25-2013
HER	C	WESTERN CIVILIZATION/H/CC	05-29-2013	08-25-2013
HER	C	HIST16-PRE CIVL WAR/LCC	05-29-2013	05-25-2013
HER	C	ENGLISH PREREQUISITE-LCC	05-29-2011	12-22-2011
HER	C	ART APPRECIATION-LCC	05-29-2011	12-22-2011
HER	C	PHYSICAL ANTHROPOLOGY	05-29-2011	12-22-2011
HER	C	APDENTAL ASSISTANT	05-29-2010	08-16-2011
HER	C	INTRO TO SOCIAL	05-18-2011	05-27-2011
HER	C	MATH 61/JAA DEGREE-H/CC	05-18-2011	05-27-2011
HER	C	POLITICAL SCIENCE-LCC	05-12-2010	12-17-2010
HER	C	BIG WORLD HIST	05-12-2010	12-17-2010
HER	C	GENERAL PSYCH-LCC	05-07-2010	09-29-2010
HER	C	COUNSELING GUIDANCE/LCC	05-07-2010	09-29-2010
HER	C	TYPING FM (12-IPM)	04-05-2010	05-07-2010

## Discipline History (Last 6 months)

Hearing Date	Prohibited Acts
-- NO INCIDENT REPORTS FOUND IN LAST 6 MONTHS --	

## Current Care Assignments

Assignment	Description	Start
CARE1	HEALTHY OR SIMPLE CHRONIC CARE	01-31-2013
CARE1-MH	CARE1-MENTAL HEALTH	08-03-2010

## Current Medical Duty Status Assignments

Assignment	Description	Start
REG DUTY	NO MEDICAL RESTA-REGULAR DUTY	01-01-2013
YES F/S	CLEARED FOR FOOD SERVICE	01-01-2013

## Current Drug Assignments

Assignment	Description	Start
DAP-DIG	DRUG ABUSE DIAGNOSIS PENDING	08-18-2014
ED-COMP	DRUG EDUCATION COMPLETE	04-01-2011
NR COMP	NRES DRUG TMTC/COMPLETE	03-16-2012

## FRP Details

## Most Recent Payment Plan

FRP Assignment: COMPLT FINANC RESP-COMPLETED Start: 04-11-2010

Inmate Decision: AGREED \$100.00 Frequency: SINGLE

Payments past 6 months: \$0.00 Obligation Balance: \$0.00

## Financial Obligations

No.	Type	Amount	Balance	Payable	Status

Sentry Data as of 02-19-2020

Individualized Reentry Plan - Program Review (Inmate Copy)

Page 2 of 4

1 Mr. Flaherty has paid his financial obligations and earned a  
 2 significant number of credits under the Second Chance Act:

Individualized Reentry Plan - Program Review (Inmate Copy)						SEQUENCE: 06862793
Dept. of Justice / Federal Bureau of Prisons						Team Date: 03-04-2020
Plan ID: 00100000000000000000000000000000						
<b>Most Recent Payment Plan</b>						
No.	Type	Amount	Balance	Payable	Status	
1	ASSMT	\$200.00	\$0.00	IMMEDIATE	COMPLETED02	
		-- NO ADJUSTMENTS MADE IN LAST 6 MONTHS --				
3	ASSMT	\$100.00	\$0.00	IMMEDIATE	COMPLETED02	
		-- NO ADJUSTMENTS MADE IN LAST 6 MONTHS --				
2	FINE	\$500.00	\$0.00	IMMEDIATE	COMPLETED02	
		-- NO ADJUSTMENTS MADE IN LAST 6 MONTHS --				
<b>Payment Details</b>						
Total Fund Deposits - Past 6 months:	\$0.00	Payments commence at 7% IVA				
New Payment Plan:	-- No data --					
<b>Progress since last review</b>						
6 Points. Inmate is working in FARM 3 with average evaluations. Enrolled in AHC/HUSV 101 AND 102 educational classes with average progress.						
<b>Next Program Review Goals</b>						
Save \$25 per month into your pre-release account. - Maintain satisfactory progress in the educational programs you are to enroll in. At least 2-3 ACH/HAC programs. - Enroll in the FDIC Money Smart Program.						
<b>Long Term Goals</b>						
Complete the following goals by your release date or 05/0/2020, whichever comes first: - Have \$900.00 saved into your pre-release account. - Complete the FDIC Money Smart Program. - Complete 3-3 ACH/HAC classes						
<b>RPC/HAC Placement</b>						
Consideration has been given for File Factor Review (Second Chance Act):						
<ul style="list-style-type: none"> <li>- Facility Resources</li> <li>- Offense</li> <li>- Prisoner</li> <li>- Court Statement</li> <li>- Sentencing Commission</li> </ul>						
<b>Comments</b>						
Subject will be individually reviewed for RPC placement in accordance with the Second Chance Act of 2007, Public Law No. 110-169 within 12 to 18 months prior to release.						

14 With one exception that occurred many years ago, where Mr.  
 15 Flaherty found tobacco while working and unwisely decided to keep it, he  
 16 has had an exemplary record in prison.  
 17

1 Mr. Flaherty has earned BOP's trust. In his job as farm driver and  
2 clerk, he delivers products to other BOP facilities. This required BOP to  
3 issue him an indefinite furlough for this purpose:



4  
5 U.S. Department of Justice  
6 Federal Bureau of Prisons

7 \_\_\_\_\_  
8 Federal Correctional Complex  
9 3901 Klein Blvd.  
Lompoc, California 93436

10 May 28, 2020

11 MEMORANDUM FOR L. J. MILUSNIC, ACTING COMPLEX WARDEN

12 *YMC:al*  
13 FROM: Y. Carlon, Camp Unit Manager  
14 SUBJECT: DANIEL ALLEN FLAHERTY Reg #09436-085

15 The above inmate maintains a Commercial Driver License and has  
16 received specialized training related to his position as a Farm  
17 driver. His duties will include delivering farm products to BOP  
facilities. At this time he is the most appropriate inmate to  
maintain this Federal Prison Industry work assignment.

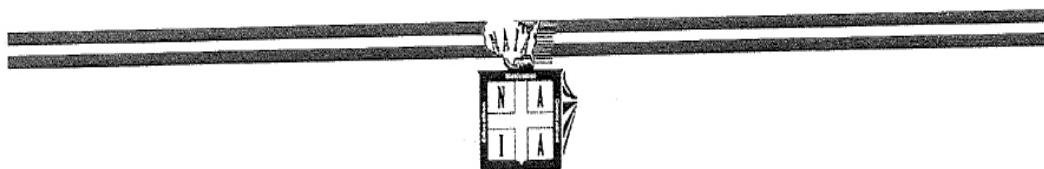
18 According to Program Statement 5280.09, Inmate Furloughs, the  
Warden may approve a furlough outside the established guidelines.

19 Approved/Denied

*L.J. Milusnic*  
17 L. J. Milusnic, Acting Complex Warden

1       The Bureau of Prisons does not believe Mr. Flaherty poses a risk of  
2 danger to the community. Neither should this Court.

3       This Court has the unique opportunity to verify Mr. Flaherty's  
4 progress. A recent article from the National Association of Institutional  
5 Agribusiness interviewed Mr. Flaherty and his supervisor.<sup>99</sup> The  
6 supervisor's report of Mr. Flaherty's is glowing:



7  
8       Asked how he sees his future once he's released, Flaherty  
9 responded by saying "I had some jobs in construction op-  
10 erating a back-hoe, and was starting a call center marketing  
11 business when I was arrested, but I never really thought I  
12 was cut out for a career working for someone else or with a  
13 big company - I just didn't think I had much to offer. After  
14 my time with UNICOR, and especially after completing  
15 this program my perspective has changed completely; I've  
16 seen what I can accomplish in the right organization and in  
17 a hands-on learning environment. I'm an example of what  
18 on-the-job training and experience can do for a person; I  
19 know what I can achieve and that when I'm released that  
myself and my family."

whether we're mending fences, milking cows or preparing  
detailed budgets. Inmate Flaherty has excelled in everything  
that I've asked of him, and he's become a leader and mentor  
among the other inmates on our crew. He's found a new  
direction in his life and I'm pleased that we've been able  
to give him the education and life tools to help him have a  
better, honest life when he completes his sentence."

Of the Clerk Training Program overall, Hayes went on  
to state "We've recognized the long lead time to train our  
clerks, and even though we graduate a clerk every four  
months, I made the commitment to keep bringing in new  
inmate trainees on a regular basis. This program has been a  
real success for our business, but more importantly we real-  
ly are changing lives with it for the positive and at the end of  
the day, that's our mission."

"Our mission at UNICOR is to protect society and reduce  
crime by preparing inmates for successful reentry through  
job training," so says Fred Hayes, "we've embraced that  
philosophy here in Lompoc from a bottoms-up perspective

99 (See Ex. A, at 7-9.)

Mr. Flaherty asks this Court to consider his remarkable achievements. "He's found a new direction in his life."

## *2. The Nature and Circumstances of the Offense and the Need to Protect the Public*

While Mr. Flaherty's history of narcotics distribution is disturbing, he does not appear to have any convictions involving violence or sexual predation.<sup>100</sup>

Mr. Flaherty has been in custody for more than twelve years on this offense. The justification for such draconian sentences is that they reduce crime. In the case of non-violent drug offenses, however, evidence suggests the opposite.<sup>101</sup>

<sup>100</sup> (See Presentence Investigation Report (PSR) ¶¶ 111-84 (detailing Mr. Flaherty's criminal history)). Mr. Flaherty does not include his arrest history in this summary as predicated a sentencing decision based on an arrest violates the due process right to the presumption of innocence. See, e.g., *United States v. Johnson*, 648 F.3d 273, 277-79 (5th Cir. 2011).

<sup>101</sup> See, e.g., Saadatman, Toma, & Choquette, *The War on Drugs and Crime Rates*, J. of Bus. & Econ. Research, Vo. 10, No. 5 (2012), available at <https://www.researchgate.net/publication/315583486> (finding the incarceration of drug offenders causes a crowding out effect in prisons, releasing non-drug offenders and thereby increasing, rather than reducing crime); see also Mark Thornton, *The Economics of Prohibition* (1991) (revealing how prohibition inevitably creates incentives for producers to increase the potency of drugs and alcohol products distributed via the black market).

1       The government will point to Mr. Flaherty's recidivism regarding  
2 drug offenses as a basis for disallowing a sentencing modification. Fair  
3 enough. However, from an economics standpoint it is not at all surprising  
4 that the strong pull of free market forces repeatedly ensnared Mr.  
5 Flaherty. The more the government attempts to restrict the supply of  
6 narcotics by incarcerating distributor, the more the market responses by  
7 increasing the rate of return for suppliers.<sup>102</sup> It is a vicious cycle and one  
8 the government will never win. It hasn't to date but the costs to society,  
9 both pecuniary and socially, have been significant.

10      Yet, the crime is not truly victimless. Mr. Flaherty recognizes his  
11 actions have caused significant social harm. Still, courts find the  
12 relatively nonviolent, market-based aspect of drug distribution crimes  
13

14      

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<sup>102</sup> See, e.g., Benjamin Powell, *The Economics Behind the U.S. Government's Unwinnable War on Drugs*, The Library of Economics and Liberty (July 1, 2013), available at <https://www.econlib.org/library/Columns/y2013/Powelldrugs.html> (Dec. 12, 2020).

15      There is no question drug distribution is a free market activity. If the  
16 global drug trade were a country, it would have one of the top twenty  
17 economies in the world. In 2005, the United Nations estimated the global  
18 illegal drug trade is worth more than \$320 billion. See Richard Branson, *The War on Drugs a Trillion-Dollar Failure*, CNN Opin. (Dec. 7, 2012),  
19 <https://www.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs/index.html>.

1 mitigating. For instance, in *United States v. Jones*, No. 20-3701, 2020  
2 WL 6817488, at \*12 (6th Cir. Nov. 20, 2020), the district court, while  
3 ultimately denying early release, looked favorably upon the fact Mr.  
4 Jones' instant conviction was for a non-violent drug offense and "he has  
5 behaved well during his current incarceration." *See also United States*  
6 *v. Luna*, 2020 WL 4696621, at \*3 (N.D. Cal. Aug. 13, 2020) (finding Mr.  
7 Luna would not pose a danger to the community if released because his  
8 instant and prior offenses involved immigration "and non-violent drug  
9 offenses).

10 Before the instant offense, the longest sentence Mr. Flaherty served  
11 was forty-six months.<sup>103</sup> He has served three times that amount in the  
12 case *sub judice*. This Court can take a chance that the lesson has finally  
13 made its required mark. If it hasn't, this Court would be fully empowered  
14 to send him right back to prison given his supervision term would be at  
15 least ten years. Because his crime of conviction is a Class A felony, it can  
16 send him back to prison for up to five years and then put him right back  
17 on supervision. *See* 18 U.S.C. § 3583(e)(3)(2018).

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<sup>103</sup> (*See* PSR ¶ 46.)

1       The risk in releasing Mr. Flaherty to home confinement is low. The  
2 benefit to him, and society given his significant strides in job training and  
3 rehabilitation, are high. Mr. Flaherty respectfully asks this Court to  
4 take a chance on him. It may be surprised at the results.

5       ***3. Deterrence***

6       Keeping Mr. Flaherty in prison does not serve a deterrent purpose.  
7 The National Institute of Justice (NIJ), an arm of DOJ itself, recognizes  
8 that: “Sending an individual convicted of crime to prison isn’t a very  
9 effective way to deter crime.”<sup>104</sup> What deters crime is the “*certainty* of  
10 being caught,” not the harshness of punishment. “Research shows *clearly*  
11 that the chance of being caught is a vastly more effective deterrent than  
12 even draconian punishment.”<sup>105</sup>

13       Adding to the NIJ’s conclusion is proof from the Sentencing  
14 Commission, which recently released a compelling study proving that  
15 longer sentences do not afford additional deterrence. In July 2020, the  
16 commission published a lengthy study comparing two groups:  
17

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18       <sup>104</sup> Nat’l Institute. of Justice, *Five Things About Deterrence* (June 5, 2016),  
19       <https://bit.ly/2XA9g2s>.

<sup>105</sup> *Id.* (emphasis added).

(1) offenders released on average three-years early under the drugs-minus-two guideline amendment; and (2) offenders who would have been eligible but completed their entire sentences before the amendment.<sup>106</sup>

The verdict: longer sentences have no deterrent effect. “There was ***no statistically significant difference*** in the recidivism rates” between the groups—in fact, the early-release group actually had a slightly lower recidivism rate.<sup>107</sup> Thus, both the NIJ and Sentencing Commission agree that holding Mr. Flaherty in prison longer will serve no deterrent purpose.

A term of imprisonment was not the only punitive impact of Mr. Flaherty’s arrest and conviction. He agreed to forfeit the gains from this crime including \$23,246.61 in cash and numerous assets.<sup>108</sup> Given Mr. Flaherty was gainfully employed in the construction industry at the time of the offenses, it is reasonable to posit that not all of what he forfeited was criminally tainted.

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<sup>106</sup> U.S. Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* (July 2020), <https://bit.ly/3e62vN0>.

<sup>107</sup> *Id.* at 6 (noting that the Retroactivity Group recidivated at 27.9%, while the Comparison Group that served the higher sentences recidivated at 30.5%).

<sup>108</sup> (*See* ECF 1246, Plea Agreement, at 19-20.)

1 Significantly, as discussed during his sentencing, the government  
2 seized his home. Mr. Flaherty maintained he purchased it with lawful  
3 funds. Law enforcement failed to maintain the residence during the  
4 winter causing pipes to freeze thereby ruining the residence. This caused  
5 hardship to the family.<sup>109</sup>

6  
7 Mr. Flaherty realizes these occurrences were the product of his  
8 criminal activity. In mentioning them, he does not wish to cast  
9 aspersions or blame. He only asks that the Court consider it in gauging  
10 the quantum of punishment already imparted.

11       ***4. History and Characteristics***

12 There is no contesting the fact that Mr. Flaherty's criminal history  
13 contains arrests for drug abuse and drug dealing. That history only tells  
14 part of his story.

15 Mr. Flaherty's exposure to drugs came at an early age. When he  
16 was five years old and living in California, his parents would leave him  
17 with his grandparents, Ed and Florence Slaughter. Ed and Florence used

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19 <sup>109</sup> (See ECF 2654, Sentencing Transcript, at 11-12.)

1 marijuana, and Ed would give young Flaherty marijuana because he  
2 thought it was “humorous.”<sup>110</sup> This exposure to drugs continued through  
3 elementary, junior high, and high school.

4 While living in Spokane, young Flaherty’s mother had a  
5 relationship with Michael Barnes, who was heavily involved in both drug  
6 dealing and abuse.<sup>111</sup> Michael Barnes was the closest thing Mr. Flaherty  
7 had to a father and he looked up to him. By the time he was eleven, Mr.  
8 Flaherty was regularly using marijuana with Mr. Barnes.<sup>112</sup>

9 When Mr. Flaherty was in high school, Michael Barnes would give  
10 Daniel Flaherty marijuana to sell to his classmates. Eventually, Michael  
11 Barnes and Daniel Flaherty began to use “hard” drugs such as cocaine,  
12 acid, heroin, crack, psilocybin mushrooms, LSD, and  
13 methamphetamines.<sup>113</sup> In fact, Michael Barnes gave Flaherty more  
14 marijuana to sell at school to help pay for their hard drug habit. Mr.  
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<sup>110</sup> (*See PSR ¶¶ 215-23.*)

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<sup>111</sup> (*See id. ¶¶ 215-16.*)

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<sup>112</sup> (*See id. ¶¶ 215, 218.*)

<sup>113</sup> (*See id. ¶ 218.*)

1 Flaherty's drug abuse and dealing continued well into his 20s and 30s as  
2 outlined by the PSI Report.

3 Another fact not indicated by his Mr. Flaherty's criminal history is  
4 his work ethic. Around 2004, Defendant Flaherty began to develop a  
5 career in the construction industry. As stated by the Presentence  
6 Investigation Report, Mr. Flaherty "participated in a heavy equipment  
7 operator's course through Spokane Community College" in 2005, which  
8 he found "to be a very positive experience that helped him to obtain good  
9 jobs."<sup>114</sup>

10 The situation has changed now for Mr. Flaherty. He has strong  
11 outside support, a robust release plan and a plan for obtaining medical  
12 insurance and care.<sup>115</sup>

13       ***5. Avoiding Unwarranted Sentencing Disparities***

14       A court can consider sentencing disparities with other co-  
15 defendants when sentencing a defendant. *See United States v. Daas*, 198  
16 F.3d 1167, 1180-81 (9th Cir. 1999); *accord United States v. Ray*, 930 F.2d  
17

18       

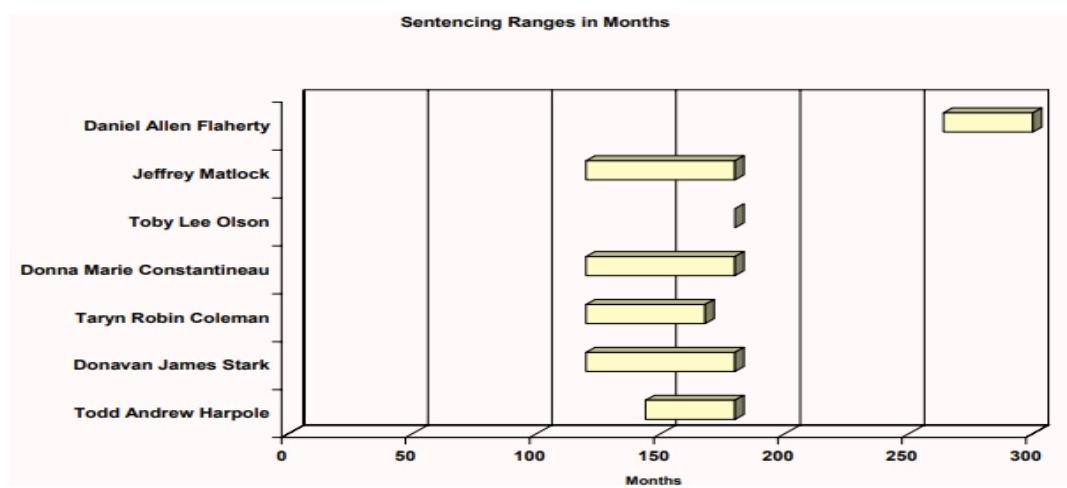
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<sup>114</sup> (*See id.* at ¶¶ 229-33.)

19       <sup>115</sup> (*See Ex. A, at 1-2; Ex. B, at 2.)*

1 1368, 1373 (9th Cir. 1991) (noting that disparity in sentencing among co-  
2 defendants is “one of the most important evils the guidelines were  
3 intended to cure.”)

4 At the time of his original sentencing, Mr. Flaherty’s sentence was  
5 in excess of those of his codefendants:



17 Mr. Flaherty recognizes there are many differences in conduct and  
18 prior history that can account for the differences. Still, Mr. Flaherty does  
19 believe it salient to consider that he has already done more time than  
many of his codefendants.

Mr. Flaherty respectfully submits that § 3553(a) sentencing factors  
weigh in favor of a sentencing modification.

## CONCLUSION

*It has long been said that a society's worth can be judged by taking stock of its prisons.*

-Justice Sotomayor<sup>116</sup>

5 Mr. Flaherty recognizes he committed a serious crime that  
6 warrants a serious sentence. To date he has served more than twelve  
7 years. While he recognizes this Court imposed a significantly larger  
8 sanction, this Court did not, and could not, have foreseen the COVID-19  
9 pandemic that would scar the world with its grim presence. Mr. Flaherty  
10 is confident this Court meant to impose a fair, just, and reasonable  
11 sentence. That sentence did not include the prospect of an early demise  
12 or serious lingering health complications. *See generally United States v.*  
13 *Safirstein*, 827 F.2d 1380, 1385 (9th Cir. 1987) (explaining that a  
14 sentence based on a material misapprehension of fact violates due  
15 process).

<sup>116</sup> *Valentine v. Collier*, 140 S. Ct. 1598 (2020) (Sotomayor, J., statement on denial of application to vacate stay).

1 As one court explained:

2 [These facilities] are plainly not equipped to protect  
3 Petitioners from a potentially fatal exposure to COVID-  
4 19. While this deficiency is neither intentional nor  
5 malicious, should we fail to afford relief to Petitioners  
6 we will be a party to an unconscionable and possibly  
7 barbaric result. Our Constitution and laws apply  
8 equally to ***the most vulnerable among us***, particularly  
9 when matters of public health are at issue. This is true  
10 even for those who have lost a measure of their  
11 freedom. If we are to remain the civilized society we  
12 hold ourselves out to be, it would be heartless and  
13 inhumane not to recognize Petitioners' plight. And so  
we will act.

7 *Thakker v. Doll*, 451 F. Supp. 3d 358, 371 (M.D. Pa. 2020).

8 Mr. Flaherty meets the statutory and equitable criteria for  
9 compassionate release. He has a serious, high-risk medical condition.  
10 Not only is he in enhanced danger if he contracts COVID-19, BOP cannot  
11 provide the care he needs to avoid needing a kidney transplant. He seeks  
12 not liberty, but a form of punishment that does not include the danger of  
13 chronic illness or death.

14 For these reasons, in the interests of justice and fairness, Daniel  
15 Allen Flaherty respectfully requests this Court enter a time-served  
16 sentence, increase his term of supervised release, and have him serve  
17 that remaining time on home confinement.

1 Dated: December 17, 2020.

2 Federal Defenders of Eastern Washington &  
3 Idaho  
4

5 */s/ Jason F. Carr*  
6 JASON F. CARR  
7 Chief Appellate Attorney  
8 Nevada Bar No. 006587  
9 10 North Post Street, Suite 700  
10 Spokane, Washington 99201  
11 (509) 624-7606  
12 Jason\_Carr@fd.org  
13  
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## CERTIFICATE OF SERVICE

2 I certify that on December 17, 2020, I electronically filed the  
3 foregoing with the Clerk of the Court using the CM/ECF System. That  
4 system will notify Assistant United States Attorney Earl Allan Hicks  
5 of this filing.

/s/ Jason F. Carr  
JASON F. CARR,  
Chief Appellate Attorney  
10 North Post Street, Suite 700  
Spokane, Washington 99201  
t: (509) 624-7606  
f: (509) 747-3539  
Jason\_Carr@fd.org